

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT CINCINNATI**

KYLE FINNELL,

Petitioner,

: Case No. 1:17-cv-268

- vs -

District Judge Michael R. Barrett
Magistrate Judge Michael R. Merz

TIM SCHWEITZER, Warden,
Lebanon Correctional Institution,

:

Respondent.

DECISION AND ORDER

This habeas corpus case is before the Court on Petitioner's "Motion to Vacate Void Judgments (ECF No. 38).

The first sentence of the Motion indicates Petitioner is objecting to the Magistrate Judge's "Order Concerning Status of the Case" (ECF No. 37) filed March 6, 2020. The filing would more appropriately have been captioned "Notice Concerning Status of the Case," since it does not decide any pending motion or order any party to take any action.

In the second paragraph, Petitioner asks if the Magistrate Judge has in fact denied his request for a second free copy of the state court record. Yes, the Magistrate Judge did deny a second free copy of the State Court Record on February 27, 2020 (ECF No. 35). In the same Order the Magistrate Judge directed Respondent's counsel to investigate whether Petitioner's first free copy of the record was in fact destroyed by corrections staff. The Magistrate Judge has not yet received a report from Respondent's counsel on that question. Given the current restrictions on state employee work imposed by the Governor and Director of Health in response to the COVID-

19 pandemic, the Court directs that Respondent's counsel respond to that question not later than three weeks after being permitted to return to work in state offices.

Next "petitioner Prays that this court to wave [sic] any and all statute of limitations, concerning time lines for reconsiderations. And or motions to vacate void judgments." (ECF No. 38, PageID 1736). That request is beyond the authority of this Court to grant and is therefore denied.

Petitioner proceeds with a long quotation from 28 U.S.C. § 2254(d). *Id.* at PageID 1737. That version of the statute was replaced in 1996 with the Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. No 104-132, 110 Stat. 1214)(the "AEDPA").

After argument about disqualification of judges, Petitioner asserts that he exhausted all available state court remedies by filing for a writ of prohibition in the Ohio Supreme Court unsuccessfully and by filing a civil rights case in this court against Judges Metz and Myers. The Magistrate Judge has previously taken note of the dismissal of the prohibition case and confirms Petitioner did file a case in this Court under 42 U.S.C. § 1983 raising these issues. Judge Barrett dismissed the latter case with instructions to Petitioner to file a habeas corpus case, which he has done.

Petitioner does not discuss the status of his motion for new trial in the Hamilton County Court of Common Pleas. On February 13, 2020, Respondent filed a Status Report indicating this case was set before Common Pleas Judge Ruehlman in the Hamilton County Court for a "plea or trial setting" on March 5, 2020 (ECF No. 33). This Court is not advised of what may have happened in that proceeding. Petitioner has not shown why he should not be required to exhaust that remedy and any appeal from an adverse ruling before this Court considers his claims on the merits.

The Motion purports to be directed to “void judgments,” but does not identify what judgments Petitioner is referring to. There are no judgments yet in this case. If Petitioner is referring to allegedly void state court judgments, that is a question for consideration on the merits of the Petition. Petitioner cites nineteenth century Supreme Court precedent on granting state prisoners relief from criminal judgments entered by courts without jurisdiction by habeas corpus or writ of error. The writ of error has been abolished. Granting relief by writ of habeas corpus requires that the petitioner exhaust state court remedies or show that the remedy is futile. Petitioner has not yet done either.

The Motion to Vacate Void Judgments is DENIED.

March 26, 2020.

s/ Michael R. Merz
United States Magistrate Judge